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NO. 96-667

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996

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UNITED STATES OF AMERICA,  
*Petitioner,*  
v.  
ROBERT E. HYDE,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS AS AMICUS  
CURIAE IN SUPPORT OF RESPONDENT

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### INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia nonprofit corporation whose membership is comprised of over 5,000 lawyers and 25,000 affiliate members. Members include citizens from each state who serve in positions which bring them into daily contact

with the criminal justice system as advocates and law professors in state and federal courts. The NACDL is a national bar organization which is working on behalf of public and private defense lawyers and is dedicated to the preservation and improvement of our adversary system of justice. The American Bar Association recognizes the NACDL and awards it full representation in the ABA House of Delegates.

The parties have consented to the filing of this brief of *Amicus Curiae* by letters filed with the Clerk.

### SUMMARY OF THE ARGUMENT

Because the defendant who enters a plea waives many of his fundamental constitutional rights concerning trial, the Due Process clause is implicated in the analysis of plea bargain procedures. Furthermore, the Ninth Circuit's decision will not cause disruption or instability in the criminal justice system.

### ARGUMENT

#### ADOPTION OF THE *HYDE* RULE WILL NOT DISRUPT THE ORDERLY ADMINISTRATION OF JUSTICE.

##### A. Ruling Below.

In the case below, the Ninth Circuit found that, where the trial court accepted a defendant's guilty plea but postponed its decision on whether to accept the accompanying plea agreement, the defendant possessed the right to withdraw his plea. The defendant could do so "for any reason or for no reason," *United States v. Hyde*, 92 F.3d 779, 781 (1996).

The Ninth Circuit held that a defendant could withdraw his guilty plea without showing cause at any time prior to the court's acceptance of the plea agreement. *Hyde*, 92 F.3d at 781. The court found that because the plea and the plea agreement were "inextricably" linked, Mr. Hyde's guilty plea lacked finality as long as the district court deferred decision on the agreement's validity. *Id.* at 780. The court noted that the distinction between the plea and plea agreement was a "distinction without a difference." *Id.*

#### B. Allowing a Defendant to Withdraw His Guilty Plea Prior to the Court's Acceptance of the Accompanying Plea Agreement Will Not Interfere With the Fair and Effective Administration of Justice.

##### 1. Plea Bargaining Has Due Process Implications.

Petitioner claims that the Ninth Circuit's decision "is without foundation and threatens to inject instability into the resolution of criminal cases through guilty pleas." Pet. Br. at 16. To the contrary, the criminal justice system does not suffer from Petitioner's dire predictions if defendants retain the ability to withdraw their plea at this preacceptance stage.

Adoption of the *Hyde* rule is consistent with fundamental fairness and is a recognition that there is a due process component to the plea bargaining process. In *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973), the First Circuit, acknowledging the constitutional implications of plea bargaining, stated:

Plea bargaining is a fundamental part of our criminal justice system as presently structured.



It produces prompt adjudications of many criminal prosecutions, thus reducing the period of pre-trial detention for those unable to make bail and permitting more extensive consideration of the appropriate disposition. These benefits flow, however, from the defendant's waiver of almost all the constitutional rights we deem fundamental.

**2. It is Likely to be the Rare Case Where a Defendant Seeks to Withdraw His Guilty Plea Pending the Court's Acceptance of the Plea Agreement.**

Amicus Curiae suggests that it is unlikely that affirming the Ninth Circuit's decision will result in defendants routinely deciding to withdraw their pleas. There are strong incentives as well as disincentives which encourage defendants to abide by their pleas. In the overwhelming number of cases, defendants plead guilty based on the strength of the government's case and the consequent advantages of accepting the plea offer. Defendants who accept such offers typically have a good sense of the sentence range they are facing and ultimately receive a lesser sentence based on their plea.

Should a defendant withdraw the plea, stand trial and be convicted, he would most likely lose the benefit of the Acceptance of Responsibility reduction under U.S.S.G. § 3E1.1

of the Guidelines.<sup>1</sup> The Commentary to U.S.S.G. § 3E1.1 pertaining to this reduction states: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."<sup>2</sup> When the case involves multiple counts, the prosecution could reinstate charges they had agreed to dismiss or file charges they had agreed not to institute. Additionally, the defendant may risk certain upward adjustments such as "Role in the Offense," U.S.S.G. § 3B1.1 or "Abuse of a Position of Trust," U.S.S.G. § 3B1.3, based upon evidence adduced at the trial.

Thus, in practice, it will be the rare case in which a defendant will seek to withdraw his guilty plea made pursuant to the terms of a plea agreement.

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<sup>1</sup>For example, a Level 28 offender in Criminal History Category IV would be facing 110-137 months in prison absent the Acceptance reduction. With the reduction, his sentencing guideline range is 84-105 months assuming timely acceptance of the plea. See U.S.S.G. § 3E1.1(b)(1) & (b)(2).

<sup>2</sup> This Commentary goes on to provide that there are "rare situations" in which a "defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial," and suggests as an example the situation where the defendant seeks to preserve a constitutional or statutory challenge. U.S.S.G. § 3E1.1, Application Note 2.

## CONCLUSION

Because the Ninth Circuit's decision is consistent with notions of fundamental fairness and due process, it should be affirmed.

Respectfully submitted,

Lisa Kemler  
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